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Washington State Court of Appeals

Division One

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Docket No. 71726-0-I

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CLERK OF COURT
STATE OF WASHINGTON
J. M. COO

LESLIE PENDERGRAST,

Plaintiff-Appellant,

v.

**ROBERT MATICHUK and JANE DOE MATICHUK,
husband and wife, et al.,**

Defendants-Respondents.

CROSS-APPELLANTS' REPLY BRIEF

Bryan D. Lane, WSBA No. 18246
*Attorney for Defendants/Respondents
Matichuk and Blaine Properties LLC*
114 W. Magnolia St., Fourth Floor
Bellingham, WA 98225
(360) 647-5163

ORIGINAL

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A. Response to Pendergrast's Statement of the Case.

Plaintiff provided a lengthy statement of the case, most of which was irrelevant to the principal issue here: that the record was insufficient for the trial court to award Pendergrast the disputed property in this case as a matter of law.

Pendergrast has not disputed the basic facts Matichuk has argued in this appeal, as follows:

Prior to their acquisition by the parties to this suit, the Pendergrast and Matichuk parcels were each owned by Tali and Cyrus Conine, as separate parcels. A home was located on the Pendergrast property; *the Matichuk property was vacant.*

* April 25, 2006, Matichuk acquired his vacant parcel from the Conines. [CP 323-6]

Prior to purchase, Bob Matichuk noted the dimensions of the lot as contained in its legal description, and paced those dimensions on the lot to confirm the lot's dimensions. [CP 53] Finding the parcel, as described in the legal description, suitable for his needs for his proposed development, Matichuk made the purchase.

* September 18, 2006, Pendergrast acquired her parcel from the Conines. [CP 319-22]

* Neither Matichuk nor Pendergrast ever talked to the Conines as part of their property purchases. [CP 329-30]

* Nothing in the paperwork for either the Matichuk transaction or the Pendergrast transaction mentions the fence in any way, and do not in any way state that the boundary between the properties is based on the fence line. [CP 319-326]

* The deeds for the respective parcels provide legal descriptions based on the legal boundaries of the parcels with no reference to the fence between the properties. Matichuk's legal description includes a specific measurement of seventy-five feet as a dimension of the parcel. [CP 331]

* A fence existed between the two parcels, located entirely within the Matichuk property. The fence did not follow a straight line. [CP 9; Appendix to opening brief]

* Pendergrast used the fenced area from 2006 to 2009. [RP 41, ln. 21] During most of that time, the Matichuk parcel was vacant and was not being used for any purpose whatsoever. Matichuk did not live on the property, and therefore did not exhibit any use of the property in a way suggesting he respected the fence as a boundary. Instead, he was doing the planning work necessary to create his condominium project.

- * September 11, 2008. Matichuk obtains approval from City of Blaine for a fourplex on his property. The building permit materials submitted base all setbacks and building envelopes on the legal description of the property, not on the fence. Pendergrast does not submit anything to the City objecting to that permit or the boundaries as depicted. [Trial Exhibit 5]
- * January 29, 2009. As construction is approaching, Matichuk writes to Pendergrast informing of his intention to move fence to the boundary created by legal description. [Trial Exhibit 10]
- * April 2009. Several weeks later, Pendergrast (through attorney Serka) writes to Matichuk about the boundary, and writes to Conine claiming misrepresentation. [Trial Exhibit 9]
- * August 24, 2009. Blaine approves new site plan for two duplex buildings instead of the fourplex, in the footprint as ultimately built. [Trial Exhibit 4]
- * November 10, 2009. Blaine issues building permit for northerly duplex. Construction started within a couple of days. [Trial Exhibit 1]
- * November 10, 2009. Blaine issues foundation permit for southerly duplex. Construction started within a couple of days. [Trial Exhibit 2]
- * February 26, 2010. Pendergrast files suit. [CP 9]
- * April 16, 2010. Pendergrast records lis pendens. [CP 22]
- * June 3, 2010. Northern building final inspection.
- * November 8, 2010. Begin construction of southern building on completed foundation.
- * March 30, 2011. Final inspection of southern building.

The trial court's ruling conveying the disputed property to Pendergrast was based solely upon Matichuk's failure to remove the fence during his ownership of his parcel while the original owner, Conine, still owned the Pendergrast parcel. The trial court concluded, as a matter of law, that Matichuk's ownership of the vacant lot with the fence remaining there during the initial five months of his ownership demonstrated the existence of an "agreement" between Matichuk and Conine that

the fence formed the boundary between the two parcels. The court reached this conclusion even though no conversations ever took place between the parties, Matichuk was not actively using the property at the time, and even though all evidence suggested that Matichuk was, at all times, working toward a development which used the entire property based upon its legal description.

It is noteworthy that the trial court found a “meeting of the minds” for the purposes of the “boundary by common grantor” doctrine, but at the same time found that no actual agreement existed as a “boundary by agreement”, and granted summary judgment to Matichuk under the “boundary by agreement” doctrine.

At the very least, these two contradictory conclusions, both as a matter of law, demonstrate the fundamental error that was committed in this case. There are no facts in the record to justify departing from the statute of frauds and imposing a boundary contrary to the sale documents for each sale in this case.

B. Summary of Argument.

This case pertains to the ownership of a disputed strip of land between two adjoining parcels in Blaine, Whatcom County, Washington. The trial court ruled that plaintiff Pendergrast owned the property *by operation of law* under the “boundary by common grantor” doctrine. The court then, based on the prior summary judgment order on liability, heard a trial on plaintiff’s damages associated with defendants’ prior “trespass” into that property, involving both use of the land and removal of a single tree.

Nothing presented in Pendergrast’s response brief in this appeal provides a justification for the trial court’s summary judgment order. This court should reverse the decision of the trial court awarding the disputed property to Pendergrast.

Should the court affirm the trial court's summary judgment order, the court of appeals should still reverse the trial court's refusal to grant a new trial on the award of plaintiff's non-economic damages. The damages awarded were grossly disproportionate to the economic harm Pendergrast suffered. Moreover, the record was replete with testimony of stressful situations separate from the actions of defendant which explained plaintiff's alleged emotional state at the time. There was no causal connection between defendants' trespass, the removal of the fence and tree, and plaintiff's claimed injuries.

C. Argument.

1. Standards on Summary Judgment.

Pendergrast devoted a significant portion of her response to whether the ultimate question in this case should be decided under a preponderance of the evidence standard or a clear and convincing standard. Matichuk agrees that this court should provide guidance to the trial court on remand concerning the proper burden of proof for this case. However, whatever the ultimate burden of proof may be is not directly relevant to the issues currently on appeal. The Whatcom County Superior Court entered summary judgment in this case on plaintiff's theory of boundary by common grantor as a matter of law. [CP 84 (order); CP 225 (Finding of Fact 5 incorporating prior order); CP 231 (Conclusion of Law 3 incorporating prior order)] It is that decision, and the evidentiary burdens it involves under CR 56, that are of importance here.

This court reviews an order of summary judgment *de novo*, engaging in the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Those standards for entry of summary judgment are well settled: summary judgment is appropriate only when there is *no genuine issue* about any material fact. Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d

562 (1990); CR 56(c). “A material fact is one upon which the outcome of the litigation depends in whole or in part.” Atherton Condominium Apartment Owners Ass’n v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The court must review the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all of the evidence, reasonable persons could reach but one conclusion. Sedwick v. Gwinn, 73 Wn. App. 879, 885, 873 P.2d 258 (1994) quoting Marincovich, 114 Wn.2d at 274. Said differently, the court must examine the evidence *and all reasonable inferences therefrom* in the light most favorable to the non-moving party. Weatherbee v. Gustafson, 64 Wn. App. 128, 131, 822 P.2d 1257 (1992).

These standards on summary judgment are critical to disposition of this case. As shown herein, there were no facts in the record from which the trial court could conclude, as a matter of law, that plaintiff Pendergrast was entitled to the disputed strip of land wholly within defendants Matichuk’s deeded property. The trial court based its decision by inferring facts that simply were not there. The trial court was required to resolve any such inferences of fact in favor of the Matichuks, and not Pendergrast. The trial court’s order should be vacated, and either the case remanded for a new trial, or for entry of an order of dismissal on all of Pendergrast’s claims.

2. The Trial Court Erred in Awarding the Disputed Property to Pendergrast.

Conveyances of real property usually must be accomplished by proper conveyance of a deed. RCW 64.04.010. A bona fide purchaser of real property generally is entitled to rely on record title. Levien v. Fiala, 79 Wn. App. 294, 299-300, 902 P.2d 170 (1995). If the law were otherwise, it would impose an almost impossible burden upon a party in that each and every conveyance would have to be investigated beyond the auditor's records for possible error to avoid a claim of inquiry notice.

Washington courts have, in only very limited circumstances, carved exceptions to the statute of frauds to permit coterminous property owners to establish a common boundary other than by deed. The “boundary by common grantor” doctrine is one of those very limited exceptions. Pendergrast here has attempted to apply this limited exception to an area of property that was wholly within the property owned by Matichuks, as provided by the legal description contained in the Matihuk deed, and as confirmed by survey.

The common grantor doctrine has been explained as follows:

A practical location made by the common grantor of the division line between the tracts granted is binding on the grantees who take with reference to that boundary. The line established in that manner is presumably the line mentioned in the deed, and no lapse of time is necessary to establish such location, which does not rest on acquiescence in an erroneous boundary, but on the fact that the true location was made, the conveyance in reference to it. However, for a boundary line established by common grantor to become binding and conclusive on grantees it must plainly appear that the land was sold and purchased with reference to such line, and that there was a meeting of minds as to the identical tract of land to be transferred by the sale. (Emphasis supplied)

Levien v. Fiala, 79 Wn. App. 294, 301 n.3, 902 P.2d 170 (1995).

Under this principle, a grantor who owns land on both sides of a line he or she has established as the common boundary is bound by that line. Fralick v. Clark County, 22 Wn. App. 156, 589 P.2d 273 (1978). The line is also binding on grantees if the land was sold and purchased with reference to the line, and there was a meeting of the minds as to the identical tract of land to be transferred by the sale. Kronawetter v. Tomoshan, Inc., 14 Wn. App. 820, 545 P.2d 1230 (1976).

Despite the fact that Matichuk was the record owner of the disputed property, Pendergrast claims ownership of it based on the claim that the property line location was established as the fence line by Conine, the “common grantor” of the Matichuk and Pendergrast lots. Pendergrast makes this

argument even though there is *no* evidence in the record of *any* interaction between Conine and either Matichuk or Pendergrast. Pendergrast makes this argument despite the fact that none of the sale paperwork for either transaction in any way references the fence at issue. Moreover, the Matichuk deed provided a specific physical dimension of the property being conveyed, and Matichuk confirmed those dimensions prior to sale. [CP 53]

Thus, Pendergrast must concede that there is absolutely no evidence *at the time of sale* which would indicate to anyone that the fence formed the property line, such that the boundary by common grantor doctrine would be applicable. See Fiala, 79 Wn. App. at 301; Strom v. Arcorace, 27 Wn. App. 478, 481, 178 P.2d 959 (1947).

Nor is there any evidence that when Matichuk and Pendergrast subsequently owned the parcels, they acted in a way to suggest that they agreed that the fence was the boundary. To the contrary, Matichuk informed Pendergrast of his intention to remove the fence and move it to the deeded property line. In response, Pendergrast wrote to Conine, and demanded financial compensation. [CP 339-40] Moreover, all the evidence demonstrates that the Matichuk property was vacant during this time period, and Matichuk was working diligently on the planning and permitting for his condominium project, using the legal description of his parcel as the proper boundary. [Trial Exhibits 1-4]

Despite these facts, Pendergrast continues to argue that Winans v. Ross, 35 Wn. App. 238, 240, 666 P.2d 908 (1983), applies to establish the common grantor doctrine in this case. Winans determined that a boundary agreement entered into by property owners is binding on subsequent purchasers, even if that agreement was not a formal contract. The Winans court ruled that “a meeting of the minds between the common grantor and original grantee may be shown by the

parties' manifestations of ownership after the sale." Winans, 35 Wn. App. at 241. In trial of the Winans case, the trial court found as fact that the properties were purchased with reference to the fence line. *Id.* at 240. Moreover, the court found "substantial evidence" that an agreement existed between the grantor and the original grantee, based on the rebuilding of a fence in the exact location, and a tenant asking permission to use a pond on the other side of the fence line for irrigation. The court then enforced the boundary agreement on Ross, a subsequent purchaser.

The trial court here purported to apply *Ross*, ruling that, based *solely* on Matichuk's failure to immediately remove the fence during the brief period of time (between April 25 and September 18, 2006, a period of less than five months) in which Matichuk owned the vacant, undeveloped parcel and Conine still owned the adjoining Pendergrast parcel. The trial court found there was a "meeting of the minds" between Matichuk and Conine *as a matter of law* because the fence remained for that brief period of time.

The court erred in that conclusion in several respects. First, *at best* Matichuks' failure to immediately remove the fence at purchase, with nothing more, creates only an *inference* of an agreement between Matichuk and Conine, and is not actual proof of one. The Matichuks are entitled to have all inferences of fact resolved in their favor. Weatherbee, 64 Wn. App. at 131. It was error for the trial court to grant summary judgment on an inference alone. There are no facts supporting the trial court's ruling. At best, there are material issues of fact about the existence of an agreement that would need to be resolved in a trial.

Pendergrast is so concerned by this argument that she falsely claims it was raised on appeal for the first time. Even assuming that an argument about the facts in the record is a "new argument," Pendergrast is simply wrong. The argument was raised both in the motion for reconsideration brief

and in the subsequent reconsideration reply brief. [CP 358, 362] The court should not countenance Pendergrast's claims or her behavior in making them.

Second, the "inference" the trial court relied upon is contrary to the factual evidence presented in the record. Nothing in the property deed conveying the property to the Matichuks mentions the fence line. The Matichuks never discussed the purchase transaction with their sellers, the Conines. There is nothing in the record to suggest that the Matichuks were informed that there was an agreement establishing a boundary at the fence line. Indeed, Matichuk testified that the purchase was made based on the property dimensions described in the deed, and he paced off those dimensions before purchase. [CP 53] Moreover, during that five month period, the Matichuk parcel was vacant and undeveloped; there was no use of the property during that time which would suggest that the fence line was being respected. Matichuk was instead moving forward with the planning and permitting for his project, using all of his available land. Thus, there were no facts upon which the court could find a "meeting of the minds" between Matichuk and Conine. The record is certainly insufficient to make that ruling as a matter of law.

Third, the inference is inconsistent with Pendergrast's own statements after the fact. When Matichuk informed Pendergrast of his intention of remove the fence, Pendergrast wrote to the seller Conine, not to demand that any boundary line agreement be enforced, but instead to demand financial compensation for an alleged misrepresentation. [CP 339-40] Pendergrast was certainly not acting under a belief of an agreement concerning the fence when she wrote that letter. Even her letter to Matichuk claiming rights to the disputed property merely establishes a factual dispute between the parties, long after they purchased their properties. It in no way establishes the conclusive proof of an agreement between Conine and Matichuk necessary to win on summary

judgment. Under these circumstances, there is absolutely nothing in the record to support an “inference” of an agreement between the common grantor and Matichuk sufficient to apply the common grantor doctrine as a matter of law.

Reduced to its essence, the trial court’s ruling – and Pendergrast’s entire argument on appeal – contends that the mere existence of the fence, coupled with use of the fence line as the boundary for a short period (when one of the lots was undeveloped and vacant), is enough to create a boundary by the common grantor. By definition, the boundary by common grantor doctrine requires more: evidence of an actual “meeting of the minds” to move the line from the deed location to another location. That agreement does not exist in this case. This court should reverse the order on summary judgment and either dismiss plaintiff’s claims outright or remand for a trial.

3. The Trial Court Should Have Granted Defendants A New Trial On The Excessive Non-Economic Damages Awarded By the Jury.

After summary judgment establishing Pendergrast’s ownership of the disputed property, the trial court held a trial related to Pendergrast’s claims of trespass on the disputed area, and timber trespass for removal of the tree. At the conclusion of that trial, the jury awarded Pendergrast damages against Matichuks and Blaine Properties LLC on her trespass claims, including \$5200 for economic loss, and \$75,000 (or more than fourteen times the economic verdict) for non-economic damages. As to timber trespass, for the removal of the single, old tree, the jury awarded plaintiff \$3310 against defendants Matichuk for her economic damages, and \$40,000 (or more than twelve times the economic verdict) for non-economic damages. [CP 203]

After the trial, defendants moved for a new trial pursuant to RCW 4.76.030; CR 59(a)(5) and CR 59(a)(9). Defendants argued that the non-economic damages awarded by the jury were so

excessive as to indicate unmistakably that the verdict was the result of passion and prejudice, and that substantial justice had not been done. The court denied the motion.

The trial court erred in its refusal to either grant a new trial, or to reduce the non-economic damages awarded by the jury. This court reviews the denial of a motion for new trial under an abuse of discretion standard. Sommer v. DSHS, 104 Wn. App. 160, 170, 15 P.3d 664 (2001). An abuse of discretion is found if the verdict evoked a feeling of prejudice by the jury such that the Matichuks were deprived of a fair trial. *Id.*

Although the standard to set aside the jury's verdict is a difficult one, it was met in this case. Ms. Pendergrast's proof of non-economic damages as presented to the jury was limited. Essentially, Pendergrast argued that the actions of Matichuk in removing the fence and tree made her "sick." [RP 61, ln. 12] She testified that the "whole experience" of the dispute and subsequent litigation made it hard for her to "remain optimistic." [RP 70, ln. 11] Nothing in her testimony suggested that she ever consulted a healthcare professional. No one close to her testified about her claimed anxiety.

Even with the additional facts from the record presented by Pendergrast in defense of the verdict, the record was replete with evidence that, at the same time as her interactions with defendants, Ms. Pendergrast was undergoing stress from other a variety of other sources. Pendergrast testified extensively about the pressures she felt in caring and providing for her adult children. [RP 9; 53]. She testified that she had other properties in foreclosure. [RP 88, lns.6-7]. She testified she "didn't know what pressure was" until she had to deal with an insurance company in regard to a plumbing malfunction in the property. [RP 32, ln. 6]

The bulk of plaintiff's evidence for her "non-economic" damages was focused on the alleged loss of her "dream" of creating a bed and breakfast on her property. [RP 19, ln. 11] She testified

that she lost some \$100,000 relating to the alleged bed and breakfast project. [RP 28, In. 1; RP 30, In. 4] Pendergrast attributed the “loss” of this “dream” to defendants, even though she admitted to many other factors which frustrated that dream. For example, she testified to a plumbing problem (which occurred before Matichuk’s removal of the fence and tree) that set the project back considerably. [See, e.g., RP 27, In. 9; RP 31, In. 24]

Most importantly, however, it was clear from Pendergrast’s testimony that the “bed and breakfast” truly was nothing more than a dream. Even though she claims to have started on the project as soon as she acquired the property in 2006 (years before the tree and fence were removed), she admitted that she had never filed a building permit for her desired swimming pool. [RP 76, In. 14] She never applied for a building permit for the renovation of the garage. [RP 76, In. 21] The only tangible evidence of a business plan was a handwritten outline produced the morning of trial. There was nothing introduced at trial about the bed and breakfast except the ideas in plaintiff’s head.

Indeed, based on her testimony it is unlikely that Pendergrast could ever have operated such a business. She testified that she had a concussion disorder from a prior automobile accident, she would have for life. [RP 59, In. 20] That pre-existing concussion condition prevented her from interacting with others when it was prevalent. She testified that “the fact that I had to sell my other house and move in there to have people coming and going as a bed and breakfast, which is a 24-7 job, I couldn’t do it.” [RP 59, In. 9-13]

In other words, Pendergrast’s tears replaced solid evidence for the jury to consider. Apparently due to the “loss” of this “dream,” the jury awarded Pendergrast over \$100,000 in “non-economic” damages, matching the “over \$100,000” Pendergrast attributed to her bed and breakfast

losses. Those damages are many multiples over the damages the jury awarded Pendergrast for her actual economic loss.

Assuming for the sake of argument that these lost profits can be attributed as a non-economic loss, the amounts awarded were clearly excessive. Pendergrast attempts to defend those damages by attacking the decision in Hill v. GTE Directories Sales Corp., 71 Wn. App. 132, 856 P.2d 746 (1993). The Hill plaintiff sued for sex discrimination. In support of her claim for non-economic damages, she testified she was constantly under heavy pressure to perform her work, and felt inadequate and frustrated because she felt insufficiently trained. She testified she consulted her doctor, who thought her problem was stress related. He referred her to another doctor, who prescribed medication to settle her nerves and calm her. Based on that testimony alone, the jury awarded Hill \$198 in stipulated medical expenses, \$40,000 in lost income (which was reduced by the trial court) and \$410,000 (ten times the economic damages) in non-economic damages. The trial court reduced the non-economic damages by more than two-thirds, finding the jury verdict shocking to its conscience because there was insufficient credible evidence of emotional distress, mental anguish, pain and suffering, or humiliation severe enough to justify the award. The court of appeals agreed, finding that the award “clearly indicates passion or prejudice, or an attempt to award punitive damages.” Hill, 71 Wn. App. at 134.

The evidence of passion and prejudice in this case is apparent. First, the jury chose to award damages only against defendants Matichuk and their corporate entity, even though the limited liability company was in the same position as other defendants whom were found not responsible. The jury inquired whether it could add attorney’s fees onto its verdict, indicating further its passion to punish the defendants: the jury wanted to go further than it was instructed it could do. [Sub. 152]

Finally, the jury actually awarded more in non-economic damages than the \$100,000 plaintiff sought. Taken together, with the amounts awarded being many multiples above the economic damages suffered, indicates that the jury award was improper. The court should either grant a new trial, or reduce the non-economic damages awarded.

Pendergrast attacks the “multiplier” analysis, contending that the ratio between the economic damages and non-economic damages is irrelevant. Under Hill, Pendergrast is simply wrong. An award of damages should be reduced by a court when the award is outside the range of evidence. It is within that analysis that proportionality may be evaluated. In Hill, the trial court reduced damages due to the disproportionate amount of noneconomic damages, such that jury’s award either indicated the jury was motivated by passion or prejudice, or the award was an effort to impose punitive damages. In our case, the noneconomic damages were even more disproportionate to the economic recovery. The court should have considered that, and reduced the award.

In sum, the non-economic damages awarded by the jury were grossly disproportionate to the economic damages awarded. The trial court abused its discretion in not reducing those damages to an amount supported by the evidence.

D. Conclusion

The trial court erred in several respects. First, the trial court erred in granting Pendergrast ownership of the disputed strip of land by operation of law under the “boundary by common grantor” doctrine. The court’s ruling cannot be sustained by the record the trial court considered. At the very least, genuine issues of material fact require reversal of the trial court’s order and remand for a new trial.

Should the court affirm the trial court's summary judgment order, the court of appeals should still reverse the trial court's refusal to grant a new trial on the award of plaintiff's non-economic damages. The damages awarded were grossly disproportional to the economic harm Pendergrast suffered. Moreover, the record was replete with testimony of stressful situations separate from the actions of defendant which explained plaintiff's alleged emotional state at the time. There was no causal connection between the removal of the fence and tree and plaintiff's claimed injuries.

Dated this 29th day of November, 2014.

Respectfully submitted,

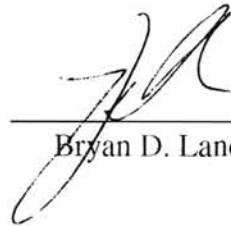


Bryan D. Lane, WSBA No. 18246
Attorney for Respondents/Cross-Appellants Matichuk and
Blaine Properties, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 3, 2014, I caused a true and correct copy of the foregoing, to be served upon the following person by hand delivery to his office provided below:

Mark Lee
Brownlie Evans Wolf & Lee
230 East Champion Street
Bellingham, Washington 98225



Bryan D. Lane, WSBA No. 18246